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No. 89-418

In the Supreme Court of the United States

OCTOBER TERM, 1989

BENJAMIN FRANCO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners are teachers and other professionals employed at United States military bases in Puerto Rico. The question presented is whether the Claims Court has jurisdiction over their claim for additional pay on the basis of their allegation that, in violation of 20 U.S.C. 241(a), they were required to work longer hours than their counterparts in the District of Columbia.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Eastport Steamship Corp. v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967)	2
Hambsch v. *United States*, 109 S.Ct. 1969 (1989)	5
United States v. *Mitchell*, 463 U.S. 206 (1983)	4
United States v. *Testan*, 424 U.S. 392 (1976)	2

Statutes and rule:

Tucker Act, 28 U.S.C. 1491	2
5 U.S.C. 5541 *et seq.*	5
5 U.S.C. 6324(a)	5
20 U.S.C. 241(a)	2, 4, 5, 6

Miscellaneous:

P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's, The Federal Courts and the Federal System* (3d ed. 1988)	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not yet reported. The opinion of the United States Claims Court (Pet. App. 5a-16a) is reported at 15 Cl. Ct. 283.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-20a) was entered on May 16, 1989. A petition for rehearing was denied on June 13, 1989. Pet. App. 21a-23a. The petition for writ of certiorari was filed on September 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are school teachers and other professionals employed by the Antilles Consolidated School System, a

subordinate agency of the United States Navy responsible for educating the children of United States personnel stationed at military bases in Puerto Rico. The governing statute, 20 U.S.C. 241(a), requires that these employees "receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia." As the court of appeals stated, "[i]t is undisputed, and the Claims Court so found, that [petitioners] received for the years at issue 'compensation equal to that of comparable [District of Columbia public school] personnel.' " Pet. App. 3a (quoting 15 Cl. Ct. at 284). However, petitioners, claiming that between 1978 and 1986 they were required to work longer hours than their counterparts in the District of Columbia, filed this suit in the Claims Court seeking additional compensation on account of the alleged overtime. The government responded that petitioners' workload has been comparable to that of their counterparts in the District of Columbia at all times and that the Claims Court lacked jurisdiction.

Without reaching the merits of the dispute, the Claims Court held that it lacked subject matter jurisdiction. The court stated that, under the Tucker Act, 28 U.S.C. 1491, " 'one must always ask * * * whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " Pet. App. 9a (quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)); see also *United States* v. *Testan*, 424 U.S. 392, 400 (1976). Turning to Section 241(a), the court concluded that "nothing in the text of the statute would permit the court to read into it a broad mandate for enforcement by money judgment." Pet. App. 14a. To the contrary, the court concluded that "Congress intended that the statute be enforced according to its terms," so that petitioners

should have applied to a district court for "specific relief to remedy an imbalance in hours of work rather than press here with what essentially amount to overtime claims." *Ibid.*

The Claims Court further held that "[i]t adds nothing to [petitioner's] case to say that their claims are also founded on the Back Pay Act, 5 U.S.C. § 5576(b)." Pet. App. 15a. "As explained in *Spagnola* v. *Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984)," the court continued, " '[u]nless some other provision of law commands payment of money to the employee for the "unjustified or unwarranted personnel action," the Back Pay Act is inapplicable.' " *Ibid.*

Finally, the Claims Court found no merit to petitioners' invocation of the applicable collective bargaining agreement, which provides that it is to be administered in accordance with "existing or future laws." Pet. App. 15a. The court concluded that the provision is not properly construed to waive sovereign immunity from monetary relief, which in any event "requires the express consent of the Congress." *Id.* at 16a.

The Federal Circuit affirmed in an unpublished opinion. Pet. App. 1a-4a. It first concluded that "[t]he proper form of relief to address [petitioners'] injury is not the payment of money damages but an adjustment in the hours they are required to work." *Id.* at 4a. It next decided that "the Back Pay Act cannot be availed of here because the allegedly unwarranted personnel action has not 'resulted in the withdrawal or reduction' of [petitioner's] pay." *Ibid.* Finally, the court of appeals agreed with the Claims Court that "[i]f section 241(a) does not entitle [petitioners] to additional pay, they cannot state a claim for damages upon a contract requiring compliance with that very same statutory provision." *Ibid.*

ARGUMENT

"[T]he Tucker Act ' "does not create any substantive right enforceable against the United States for money damages." ' " *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983). Rather, "[a] substantive right must be found in some other source of law." *Ibid.* In this case, if such a right exists, it can be found only in Section 241(a). The courts below correctly concluded, however, that petitioners have no claim for money damages under that statute.

As the courts below stressed, Section 241(a) simply provides that employees such as petitioners "shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia." The courts below reasonably concluded that Section 241(a) may be enforced in a case such as this only by an action for injunctive relief because petitioners do not contend that they received less compensation than their counterparts in the District of Columbia, but instead claim that they worked longer hours. The remedy for that claim is an order adjusting their hours of work, not an order adjusting their compensation.

Petitioners argue (Pet. 11-12) that "compensation" in Section 241(a) should be read to mean "hourly compensation." But petitioners and their counterparts in the District of Columbia do not receive compensation at an hourly rate. Rather, they are professional, salaried employees who are paid on an annual basis and are expected to do what they must to get their work done. They do not receive overtime pay. It would be contrary to Section 241(a), which mandates equal compensation, to order the United States to pay petitioners more than their counterparts in the District of Columbia received. In addition, Section 241(a) expressly

exempts employees such as petitioners from 5 U.S.C. 5541 *et seq.*, the overtime pay provisions governing federal employees. Thus, the statute does not contemplate overtime pay for petitioners.

Nor is there merit to petitioners' contention (Pet. 18-21) that the courts below committed the same error identified by three Justices in their dissent from denial of certiorari in *Hambsch* v. *United States*, 109 S. Ct. 1969 (1989). The statute at issue in that case, 5 U.S.C. 6324(a), provides that certain police officers are not to be forced to use sick leave when injured in the performance of duty. The government suggested, as the dissenters concluded, that the statute mandates paid administrative leave for such officers and that an officer's claim for paid leave should not have been dismissed by the Claims Court for lack of jurisdiction. But while the statute at issue in *Hambsch* requires that officers be paid for leave caused by accidents arising from the performance of duty, Section 241(a) does not call for a monetary remedy in this case. As reasonably construed by both courts below, it contemplates only that petitioners' hours of work should be adjusted if there is merit to their claim.[1] Thus, the court of appeals undertook the "proper inquiry," which is whether an employee has alleged the violation of a statute that "has resulted in the unlawful withholding of compensation to which he or she would otherwise be entitled" (109 S. Ct. at 1971 (dissent from denial of certiorari)), and correctly concluded that petitioners have advanced no such allegation.

Finally, for the many reasons given by the courts below, petitioners' claims are not furthered by their citations to the Back Pay Act and the applicable collective bargaining agree-

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[1] Indeed, any other construction would raise serious problems about the appropriate remedy for other alleged disparities under the statute, such as "tenure" and "other incidents of employment."

ment. That reliance on the Back Pay Act does not add to petitioners' argument is made most clear, as the court of appeals explained (Pet. App. 4a), by the fact that the statute provides for back pay only where the violation of some other personnel statute or regulation has led to a "withdrawal or reduction" of pay. Thus, whether petitioners are owed back pay depends on the meaning of Section 241(a). With respect to petitioners' contentions based on the collective bargaining agreement, it seems plain, as the court of appeals stated (Pet. App. 4a), that if Section 241(a) does not call for monetary damages under the facts of this case, a provision that merely requires compliance with the governing statutes does not provide a remedy in monetary damages. Thus, even apart from other statutory and contractual barriers to an action based on the collective bargaining agreement, any contractual relief that may be warranted is not available in the Claims Court.[2]

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[2] It is well established that, in contract actions as in other Tucker Act actions, the Claims Court has no equitable jurisdiction, except in certain limited instances to provide incidental and collateral relief to the award of monetary damages. See authorities cited in P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1146 & nn. 7, 8 (3d ed. 1988).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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